



UNITED STATES PATENT AND TRADEMARK OFFICE

MIT
COMMISSIONER FOR PATENTS
UNITED STATES PATENT AND TRADEMARK OFFICE
WASHINGTON, D.C. 20231
www.uspto.gov

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Paper No. 16

Application Number: 09/734,196
Filing Date: December 12, 2000
Appellant(s): KALVELAGE ET AL.

John H. Thomas
For Appellant

MAILED
MAR 21 2002
GROUP 3700

EXAMINER'S ANSWER

This is in response to the appeal brief filed February 10, 2003.

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) Status of Claims

The statement of the status of the claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Invention

The summary of invention contained in the brief is correct.

The appellant's statement of the issues in the brief is correct.

(7) Grouping of Claims

Appellant's brief includes a statement that the claims 1-17 do not stand or fall together and provides reasons as set forth in 37 CFR 1.192(c)(7) and (c)(8).

(8) Claims Appealed

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) Prior Art of Record

| | | |
|-----------|------------------|--------|
| 5,860,549 | Allers et al. | 1/1999 |
| 5,339,973 | Edwards et al | 8/1994 |
| 6,039,495 | Zimmerman et al. | 3/2000 |

(10) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

I. Claims 1, 3, 6-14, 16 and 17 are rejected under 35 U.S.C. 102(b) as being anticipated by Allers et al (Patent no. 5,860,549). A sealed blister assembly is disclosed comprising a plastic sheet formed with a recess 25 having an undercut 44. An equivalent lid 12 is attached to cover the opening of the recess. The lid includes a raised ridge 28 adapted to engage the undercut of the plastic sheet.

With respect to claim 3 the ridge 28, i.e., as shown in figure 2a, has walls on both sides leading to the top of arc that flare outwardly. Similarly, the undercut also has “sidewalls” on either side leading to the arc in the bottom of recess 44 to the extent recited in claim 4, see e.g., figure 2B.

As to claims 6-8, conventional materials are contemplated in column 3, lines 14-16 where the subject matter of these claims are believed to be contemplated.

With respect to claim 10 the undercut sidewalls are shorter than the ridge wall because the ridge walls fist within the undercut and extends beyond and out of the undercut, note figure 4.

In as much as claims 11 and 12 recite the blister assembly meet or exceed the requirements of a Class A or Class B container, it is not seen what is defined within this language that distinguishes the present subject matter based upon the recited comparison. Otherwise stated, in the form drafted, it would appear subject matter meeting claim 1 would also meet claims 11 and 12 since the examiner knows of no measurable parameter serving to provide a distinction based upon this language.

As to claim 13 a planar shoulder 42 is formed along the peripheral portion of the sheet used to form the recess 25. A perimeter is also formed around the recess. Also, since the recess of Allers et al is fully capable of receiving medication, this is merely a matter of intended use. A reference that contains all the structure defined in a claim, but not the recited use anticipates the claim because a new use does not make an old product patentable, *In re Schreiber*, 128 F.3d 1473, 44 U.S.P.Q.2d 1429 (Fed. Cir. 1997).

As to claims 16 and 17 the length and width dimensions of the ridge 28 of Allers et al is considered larger than the corresponding dimensions of the undercut to the same extent as that shown in figure 2 of the present invention. Particularly in light of the undercut outside wall taper resulting in a lesser dimension than the outermost dimension of the ridge.

II. Claims 1, 3-14, 16 and 17 are rejected under 35 U.S.C. 102(b) as being anticipated by Edwards et al (Patent no. 5,339,973). As sealed blister is provided having a similar construction as Allers et al where a sealed blister assembly is disclosed comprising a plastic sheet formed with a recess having an undercut 40. An equivalent lid 12 is attached to cover the opening of the recess. The lid includes a raised ridge 38 adapted to engage the undercut of the plastic sheet. Figures 8 and 9 show other embodiments having similar constructions.

In as much as claims 11 and 12 recite the blister assembly meet or exceed the requirements of a Class A or Class B container, it is not seen what is defined within this language that distinguishes the present subject matter based upon the recited comparison. Otherwise stated, in the form drafted, it would appear subject matter meeting claim 1 would also meet claims 11 and 12 since the examiner knows of no measurable parameter serving to provide a distinction based upon this language.

As to claim 13 a planar shoulder 42 is formed along the peripheral portion of the sheet used to form the recess 25. A perimeter is also formed around the recess. Also, since the recess of Allers et al is fully capable of receiving medication, this is merely a matter of intended use. A reference that contains all the structure defined in a claim, but not the recited use anticipates the claim because a new use does not make an old product patentable, *In re Schreiber*, 128 F.3d 1473, 44 U.S.P.Q.2d 1429 (Fed. Cir. 1997).

As to claims 16 and 17 the length and width dimensions of the ridge 28 of Allers et al is considered larger than the corresponding dimensions of the undercut to the same extent as that shown in figure 2 of the present invention. Particularly in light of the undercut outside wall taper resulting in a lesser dimension than the outermost dimension of the ridge.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

III. Claims 4 and 5 are rejected under 35 U.S.C. 103(a) as being unpatentable over Allers et al as applied to claims 1 and 3 above, and further in view of Edwards et al (Patent no. 5,339,973). The difference between Allers et al and the subject matter of these claims resides in the undercut having sidewalls that are in frictional engagement with the outside edge of the ridge wall. Edwards is cited for the motivational teaching of figures 6-8 and column 3, lines 5-11.

To the extent that Allers et al fails to teach an undercut having sidewalls that are in frictional engagement with the outside edge of the ridge wall, the prior art fairly teaches such a modification in order to provide a tight seal between the tray and lid. Accordingly, modifying Allers et al by constructing sidewalls in frictional engagement with the outside edge of the ridge walls would not have involved an inventive step.

IV. Claims 6-8, 11 and 12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Allers et al (Patent no. 5,860,549). To the extent that the blister package is not of the class claimed or made of polyethylene, it would have been obvious to one having ordinary skill in the art at the time the invention was made to employ polyethylene of Class A or Class B, since it has been held to be within the general skill of a worker in the art to select a known material on the

basis of its suitability for the intended use as a matter of obvious design choice. In re Leshin, 125 USPQ 416.

V. Claims 2 and 15 rejected under 35 U.S.C. 103(a) as being unpatentable over Zimmerman et al (Patent no. 6,039,495) in view of Allers et al (Patent no. 5,860,549). Zimmerman discloses a sheet having a plurality of recesses with individual lids sealing the same. The difference between the claimed combination resides in the undercut formed in the perimeter all around the recess. Allers discloses such sealing arrangement in figures 2A. It would have been obvious to one of ordinary skill in the art to modify the sealing arrangement of Zimmerman by constructing an undercut engaging a raised ridge as taught by Allers et al, in order to form a seal in the opening that provides a tighter engagement around the entire periphery.

VI. Claims 2 and 15 rejected under 35 U.S.C. 103(a) as being unpatentable over Zimmerman et al (Patent no. 6,039,495) in view of Edwards et al (Patent no. 5,339,973). Zimmerman discloses a sheet having a plurality of recesses with individual lids sealing the same. The difference between the claimed combination resides in the undercut formed in the perimeter all around the recess. Edwards discloses such sealing arrangement in figures 6-9. It would have been obvious to one of ordinary skill in the art to modify the sealing arrangement of Zimmerman by constructing an undercut engaging a raised ridge as taught by Edwards, in order to form a seal in the opening that provides a tighter engagement around the entire periphery.

(11) Response to Argument

Following the form of appellant's brief the following arguments are correspondingly framed.

A. Claims 1, 3, 6-14, 16 and 17 are rejected under 35 U.S.C. 102(b) as being anticipated by Allers et al (Patent no. 5,860,549)

It is submitted Allers et al discloses the present invention in as much as is set forth in the claims to which the patent is applied as explained in paragraph I, section (10) above. With

respect to claims 1, 3 and 9, appellant argues the Examiner never specifically referenced claim 9, the Examiner makes no allowance for the limitation in those claims that the engagement of the ridge and undercut forms an impermeable seal, page 7 of brief. However, the Examiner respectfully disagrees.

In forming rejections it is common practice to provide a generally explanation of relevancy. Where an interpretation may be unclear or explanation is necessary to glean an understanding, claims are individually treated. This is the practice followed by the Examiner in the present appeal. Claim 9, is embodied in the grouping of claims and the fact that no individual explanation of that claim has been incorporated in the body of the rejection should not infer that the Examiner makes no allowance for those limitations.

Claim 9 recites, undercut sidewalls that flare outwardly in a corresponding fashion to the flared ridge wall. As seen in figure 4 of Allers, the equivalent undercut 44 and raised ridge 28 are "horseshoe" or "omega" shaped. The sides of this shape form the "walls" of claim 3 and was explained during the Interview (see page 6 of brief) to be the sidewalls of the ridge recited in the claims. As shown in figure 4 it is seen that these equivalent sidewalls are angled or "flare" outward. In fact, it is suspected the Examiner's clear of explanation of the details recited in the claims to the corresponding subject matter of Allers in said Interview facilitated the present appeal and appellant's depiction of Allers figure 4 on page 8 of appellant's brief. Accordingly, it is respectfully submitted the Patent Judges find that the Examiner did indeed specifically make allowance for the limitations of claim 9.

As to showing of Allers figure 4 provided on page 8 of appellant's brief, it is submitted there is no continued misunderstanding by the Examiner of the claimed invention but that the substantial evidence indicates the misunderstanding is appellants. Notwithstanding figure 4 depicting a gap between protrusion 28 with recess 44, it is incorrect to surmise Allers "does not actually teach or enable a seal that could be characterized in any way as an impermeable seal as in the claimed invention", page 8 of appellant's brief.

Column 3, line 64 to line 5 of column 4 in Allers sets forth a protrusion 28 having a cross

sectional span of at least 180 degrees, and preferably 200 to 340 degrees. Column 4, line 52 to line 58 of Allers provides a recess 44 for releasable snap-fit securement to male engagement protrusion 28 that “conforms” to the outer portion of the male protrusion 28. Our (undersigned conferees) understanding of a snap-fit means that outer edge of recess 44, upon engagement with protrusion/ridge 28, “flexes” outwardly creating room for the protrusion, then rebounds back to engage with the protrusion/ridge 28 making an audible noise. Thus the “snap-fit” name derived. With reference to the mating arc sections of male protrusion/ridge 28 and female nesting recess 44 respectively, they function to seal “against gases, vapors and liquids”, column 5, line 1.

Moreover, we believe the limitations of the claims are met by the aforementioned discussion as one skilled in the art would glean from reference. Nothing in Allers indicates a gap is desired or results from the conforming mating engagement. There are many reasons why figure 4 could depict a gap ranging from an effort to show distinct layers of the container to distortions magnified by appellant’s enlargement. None of which has anything to do with the impermeable seal disclosed. Absent a discussion otherwise, one is guided by what the reference makes clear. Accordingly, there is substantially evidence that demonstrates the language “wherein the engagement of the ridge and undercut forms an impermeable seal” of claim 1 is anticipated by Allers along with the wall limitations of the claims.

With reference to appellant’s charge that a discussion of an impermeable seal in the context of a pie shell is inappropriate, it is not seen why. Food is subject to degradation from moisture, air or vapor resulting in spoiling. The sensitivity of this product to bacteria along with the natural effects of spoiling would appear extremely pertinent to discussion of impermeable seals.

With respect to claims 6-8 appellant contends Allers fails to teach the use of polyethylene as a polymer. However, we respectfully disagree. Column 3, lines 15 to 16 states “clear plastic material of known type and molded per known techniques of the packaging industry” are used. The fact the Allers does not specifically state we use polyethylene implies “blindness” with regard to any practical interpretation of this statement. Appellant does not claim to be the inventor of polyethylene or to be the first to use polyethylene in container packages. Only that Allers does not specifically name this material.

The substantial evidence of record indicates polyethylene, polypropylene or polystyrene are conventional plastic materials, e.g., see Patent no. 3,388,827 column 4, lines 8-10, Patent no. 3,346,099 column 2, line 15, Patent no. 5,129,517 column 3, line 35 (PET, polyethylene terephthalate), Patent no. 5,803,248 column 3, line 28 (PET), Patent no. 5,339,973 column 1, line 32 and Patent no. 5,377,860 column 6, lines 43-50 for conventional polyethylene polymers. All of these patents are of record and represent only a portion of a total record available. Arguing the non-specific reference to polyethylene in Allers represents a disclosure that is too broad is akin to holding the use of leather is not envisioned by a patent to a shoe stating any conventional materials of the industry can be used.

We think the substantial evidence of record is sufficient to demonstrate polyethylene is fully encompassed and envisioned by Allers, column 3, lines 15 and 16. Appellant's arguments that the polymer offers qualities of softness and sealability represents why there is a substantial record of this material rather than a lack of specific teaching.

As to claim 10, appellant argues there is no teaching in the Allers reference that the undercut side walls are shorter than the ridge walls. However, the Examiner re-iterates as in said interview, the ridge walls of protrusion 28 are, by disclosure, of dimension not only to fully mate with recess 44 but must extend outward beyond the peripheral flange 42 around the recess 44. The same is true of the opposite walls on the inside of the of the arc shaped recess 44 and protrusion 28. This manifestly implies the parameter of claim 10 and a study of figure 4 supports this holding.

With respect to claims 11 and 12, it is not seen how it can be held Allers simply has "no indication of any sealing attributes therein", page 9 lines 18, 19 of appellant's brief. As indicated herein, this is simply not the case.

As to claim 13, the Examiner is not heard to say that since Allers can physically hold medication this is in fact a pharmaceutical medication dispensing assembly. Nowhere does the rejection even begin to purport this mis-construction. Rather claim 13 recites a package "for" dispensing a pharmaceutical medication where a pharmaceutical medication is positioned in the recess. This distinguishes over the product of Allers only as a matter of intended use. One can presumably put whatever one desires into container Allers. The fact that claims intended for the

field of pharmaceutical medication packaging are not distinct from a “pie dish” (as appellant so plainly phrases) is no misunderstanding or fault of the Examiner. It is incumbent upon appellant to define their invention in the claims so that it distinguishes from the prior art. As such, appellant has failed to do so. Claim 13 only differentiates from the “old” prior art product by the recited use. All of the structure being contained in Allers. For this reason we respectfully urge the rejection to claim 13 be maintained.

With respect to claim 14, this claim is similar in content to claim 9 and included in the same vein. The reusable snap-fit mating relationship detailed in Allers implies the subject matter of these claims to us.

Finally with respect to claims 16 and 17, the Patent Judges’ attention is directed to page 5 of the brief. Here appellant shows a cross section that could be either the length or width. When the dimension of the ridge is greater than that of the recess, a frictional force is created. This is exactly what the snap-fit parameters imply. The length and width dimensions of the ridge 28 in Allers exceed that of the recess 44 thus owing to the snap-fit locking engagement. If such were not the case than the container sections of Allers would simply rest one atop another. Having no snap-fit, no mating contours nesting within each other and no locking engagement sealing against gases, vapors or liquids as extensively detailed therein. At least this is our understanding of the disclosure and affirmation of the rejections are urged for these reasons.

B. Claims 1, 3-14, 16 and 17 are rejected under 35 U.S.C. 102(b) as being anticipated by Edwards et al (Patent no. 5,339,973)

Edwards et al is similar to Allers with the exception that the reference states, the outer surface of protrusion 38 has a radius slightly more than the radius of the inner surface of flange 40. The Examiner cited this reference to demonstrate continuous contact of the mating snap-lock surfaces in direct contradiction to the gap alleged in appellant’s representation of Allers’ figure 4.

Column 3, lines 9-11, states “outside surface of flange (equivalent ridge recited in claims 1 and 13) 38 forms a continuous contact with inside surface of flange 40” (equivalent undercut recited in claims 1 and 13).

Appellant argues at the outset all the rejections on the basis of the Edwards reference should fail because there is no explicit teaching or other enablement of an impermeable seal, page 10 of appellant’s brief. However, we respectfully disagree.

The above description of the relative differences in radii along with the continuous mating contact of flanges provides the enablement argued to be lacking. That along with the clear statement in column 1, lines 10-11 of “the improved latch of the invention forms a tight seal that prevents air from entering the container”, convinces us Edwards provides both enablement and a teaching of an “impermeable” seal.

Appellant’s reading of column 3, lines 16-19 of flanges 38, 40 having a radius that are approximately equal (emphasis in original) is not taken to imply a gap as alleged with Allers’ figure 4. Rather, this language taken in context with the entire paragraph that permits a “tighter seal”, column 3, line 25 that does not diminish the impermeable seal.

The rejection of claims 11-13, 16 and 17 are noted by appellant to be literal duplications of the rejections applied to Allers. Which is agreed to be similar in the nature of the disclosures. As such, affirmation of these claims are urged for the same reasons as discussed previously.

C. Claim rejections under 35 U.S.C. § 103 (a)

Claims 4 and 5 are considered by appellant to fall since any combination of unpatentability with Allers or Edwards will fail because these patents do not include an impermeable seal. It is agreed claims 4 and 5 will stand or fall with rejections applied to Allers and Edwards. However, it is believed the Examiner has ample support demonstrating an impermeable seal is disclosed by both Allers and Edwards.

With respect to the rejection to claims 6-8, 11 and 12 provided under obviousness, we know of no guiding authority that requires a strict “word for word” identification of elements be found within the four corners of a reference in order to anticipate a claim. References are evaluated by what their disclosures suggest to one skilled in the art. However, to the extent that the Patent Judges’ find polyethylene not to be envisioned by the disclosure of Allers we believe the use of polyethylene would have been obvious.

There is ample evidence of record showing polyethylene to be a conventional plastic material desirable for use in a sealed container arrangement , e.g., see Patent no. 3,388,827 column 4, lines 8-10, Patent no. 3,346,099 column 2, line 15, Patent no. 5,129,517 column 3, line 35 (PET, polyethylene terephthalate), Patent no. 5,803,248 column 3, line 28 (PET), Patent no. 5,339,973 column 1, line 32 and Patent no. 5,377,860 column 6, lines 43-50 for conventional polyethylene polymers.

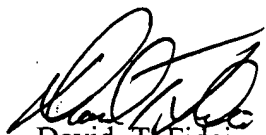
If appellant has made their application based some critical or unexpected result attributed to polyethylene achieving a different product in an impermeable way, it is respectfully submitted they have failed to make their case and the prior art indicates otherwise. Accordingly, it is respectfully submitted the rejection in this capacity should also be affirmed.

Finally, with respect to the rejection of claims 2 and 15, we believe there is motivation (reason) for combining Zimmermann with Allers and Edwards by nature of these references dealing with the same general problem of attaching a cover or lid to a base. In Zimmermann sets of locking projections 44 and indentations 46 function to retain the front planar section 12 in position on top of section 26, column 4, lines 30-34 and figure 2. A similar embodiment of two hinged sections is shown in figure 7. One of ordinary skill in the art would have found it a matter of routine skill and obvious to substitute one locking arrangement for another. In the present instant we believe such is the case as it would have been prima facie obvious to modify Zimmermann with a locking arrangement encompassing the entire perimeter as taught by Allers and Edwards, in order to form a seal in the opening that provides a tighter engagement around the entire periphery

Art Unit: 3728

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



David T. Fidei
Primary Examiner
Art Unit 3728

Dtf

March 18, 2003

Conferees



Jim Foster
Primary Examiner



Mickey Yu
Supervisory Patent Examiner
Group 3700

MILLEN, WHITE, ZELANO & BRANIGAN, P.C.
Arlington Courthouse Plaza I
Suite 1400
2200 Clarendon Boulevard
Arlington, VA 22201



**UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office**

ASSISTANT SECRETARY AND COMMISSIONER
OF PATENTS AND TRADEMARKS
Washington, D.C. 20231

MEMORANDUM

TO: GROUP 3728 DIRECTOR

**FROM: BOARD OF PATENT APPEALS AND
INTERFERENCES**

SUBJECT: ORDER REMANDING TO EXAMINER

**We are forwarding this application to
your Group for taking further action
consistent with the decision of the Board
remanding this appeal to the Primary Examiner.**

**Program & Resource Administrator
Board of Patent Appeals and Interferences
308-9797**